

No. 47973-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

E.A.S.,

Appellant.

On Appeal from Pierce County Superior Court, Juvenile Division
Cause No. 15-8-00042-7
The Honorable G. Helen Whitner, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The juvenile court did not have authority to order E.A.S. to pay restitution because the victim's loss or damage was not a result of the offense committed by E.A.S.
2. The juvenile court abused its discretion when it ordered E.A.S. to pay the entire amount of the victim's loss or damage without first considering the circumstances of the case and the interest of justice.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the juvenile court found E.A.S. guilty of simple fourth degree assault because the State did not prove that E.A.S. caused an injury to the victim, and where the restitution statute only allows restitution if the victim's injury is a result of the offense, did the juvenile court exceed its statutory authority when it ordered E.A.S. to pay restitution to the victim? (Assignment of Error 1)
2. Where the State did not prove that E.A.S. caused an injury to the victim, and where the evidence showed that an uncharged juvenile punched the victim several times before E.A.S. punched the victim and therefore could have been responsible for the victim's injuries, and where the juvenile

restitution statute requires the court to consider the circumstances of the parties and the interest of justice when deciding how much restitution to order a juvenile to pay, did the juvenile court abuse its discretion when it ordered E.A.S. to pay the entire amount of the victim's loss or damage? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged E.A.S. as an accomplice to second degree assault (RCW 9A.36.021(1)(a)).¹ (CP 1) Two other juveniles, E.L.G. and M.M.R., were also charged. (CP 1) But only E.A.S. and E.L.G. were tried together.² Following a bench trial, the court found E.A.S. guilty of fourth degree assault and found E.L.G. not guilty. (RP 366, 368-69; CP 13) The court imposed no additional period of incarceration, six months of community supervision, 30 hours of community service, and converted mandatory legal financial obligations to an additional seven hours of community service. (RP 407-10; CP 15, 18) The court also

¹ Any juveniles involved in this case are referred to by their initials in order to protect their privacy.

² It is not clear from the record in this case how the charge against M.M.R. was resolved.

ordered E.A.S. to pay restitution in the amount of \$4,183.93. (RP 427-28; CP 17-18) E.A.S. timely filed a Notice of Appeal seeking review of the restitution order.³ (CP 61-63)

B. SUBSTANTIVE FACTS

This case involves an after-school fistfight between students at Spanaway Lake High School on January 12, 2015. (RP 113, 184-85) It began after B.D. had an altercation in the school lunchroom with T.O.⁴ (RP 117-18, 186-87) B.D.'s boyfriend, Q.R., was upset about the incident, and a confrontation between the two boys resulted in T.O. challenging Q.R. to a fight. (RP 188) Q.R. did not accept the challenge and instead walked away. (RP 188-89)

But B.D. and Q.R. were still upset and felt that T.O. had been disrespectful. (RP 117-18, 191, 289) So via text messages between B.D. and T.O.'s girlfriend, C.D., arrangements were made for Q.R. and T.O. to meet at T.O.'s house after school to settle the issue with a physical fight. (RP 115, 119-20, 192) T.O. testified that he agreed to fight Q.R. (RP 191)

³ E.A.S. originally filed a Notice of Appeal from his conviction and sentence, but subsequently filed an Amended Notice of Appeal limiting review to the restitution order. (CP 45, 61)

⁴ Both T.O. and B.D. were suspended as a result of this lunchroom incident. (RP 187)

T.O. drove home from school with C.D., and when he neared his house he saw Q.R. with a group of students, including B.D., C.L., E.A.S., E.L.G. and M.M.R. (RP 128, 192) T.O. pulled the car into the driveway, and told C.D. to go inside the house, which she did. (RP 129, 193) T.O. waited at the end of his driveway as the group of students approached. (RP 128, 194)

With the rest of the students watching, Q.R. and T.O. squared off and began to fight. (RP 129, 194, 290) Q.R. punched T.O. in the face, knocking him to the ground. (RP 131, 163, 194, 292, 307) Short cellphone videos taken by the students also show Q.R. landing several hard punches on T.O.'s face, and show T.O. falling to the ground two or three times.⁵ (Exh. P19; RP 131, 146,)

Feeling he had won the fight, Q.R. and his friends began walking away. But T.O. followed them and yelled for Q.R. to come back. (RP 132-33, 194, 195, 294) E.A.S. then turned around and approached T.O. (Exh. P19; RP 133, 196) On a cellphone video, E.A.S. and T.O. are both seen taking fighting stances, then E.A.S. punches T.O. (Exh. 19; CP 11; RP 133, 134, 197)

T.O. and C.D. testified that T.O. fell and hit his head, and lay

⁵ Q.R. was not charged with assault, presumably because T.O. agreed to fight Q.R. and it was therefore consensual and, in the words of the prosecutor, a "mutual assault." (RP 191, 328)

dazed and motionless on the ground as E.A.S., E.L.G. and M.M.R. punched and kicked him. (RP 134-35, 136, 197-98, 211) But the juvenile court found that this testimony was not credible, and that it was contradicted by cellphone videos and by handwritten statements prepared just after the fight. (CP 10-11; RP 375-76; Exh. P19, D22, D23)

On one of the cellphone videos, T.O. can be seen on the ground, grabbing at E.A.S.'s leg as he tries to walk away. (Exh. P19; RP 331-32) E.A.S. stumbles but regains his balance, then turns and hits T.O. (Exh. P19; RP 331-32) This is confirmed by testimony from another witness, C.L. (RP 293, 298, 307) C.L. also testified that E.L.G. never struck T.O., but merely grabbed him to pull him off of E.A.S. (RP 293, 297, 298)

When a neighbor came outside and threatened to call the police, the fight ended and Q.R., E.A.S. and the rest of their group left. (RP 139, 298) But a still irate T.O. "stormed off" to find them. (RP 29-30, 31, 141)

T.O. eventually came home again, shortly after his mother had returned from work. (RP 34, 35) Stephanie Orr testified that T.O. was bruised and bleeding, and seemed disoriented. (RP 35) T.O. told her that some kids had "jumped" him, so she called the

police. (RP 36) After the police left, and T.O. still seemed unfocused, she decided to take him to the hospital. (RP 38) T.O. received stitches to close a cut that went all the way through his lip, and he was checked for a concussion. (RP 39-40) Since the incident, T.O. gets headaches and nosebleeds, and has a scar on his lip. (RP 41-42, 233)

T.O. claimed that the blows from Q.R. caused a bloody nose, and that the “through-and-through” lip injury and head injury occurred during his fight with E.A.S., E.L.G. and M.M.R. (RP 204, 233) But the juvenile court found that this testimony was not credible or supported by the evidence. (CP 11) Q.R. clearly landed several forceful punches to both sides of T.O.’s face, and knocked T.O. to the ground two or three times. (Exh. P19; RP 292, 375) T.O. testified that he felt disoriented after his fight with Q.R. due to the blows to his face. (RP 222)

The juvenile court concluded that T.O. suffered substantial bodily harm, as required for a second degree assault conviction. (CP 11; RP 362-63) The court also concluded that E.A.S. assaulted T.O. (CP 11, 13; 364, 366) But the State failed to prove that E.A.S., rather than Q.R., inflicted T.O.’s injuries. (CP 12; RP 365-66) The court concluded that E.A.S. was therefore guilty of

simple fourth degree assault. (CP 13; RP 366)

IV. ARGUMENT & AUTHORITIES

The State requested restitution in the amount of \$4,183.93. (RP 424; CP 22) Based on documents provided by T.O.'s mother, \$937.39 of that amount would reimburse T.O.'s family for their out-of-pocket medical expenses, and the remaining \$3,246.54 would reimburse T.O.'s health insurance provider. (RP 423-44; CP 22)

Counsel for E.A.S. requested that he not be held responsible for the entire amount of T.O.'s loss, as the evidence showed several severe blows by Q.R. to T.O.'s face during their "mutually agreed-to fight," and because the court was unable to determine whether E.A.S. caused any injury to T.O. (RP 424-25)

The prosecutor asked the court to hold E.A.S. responsible for the entire amount of loss because the medical expenses "come primarily from the through-and-through cut" to T.O.'s lip, and "we do know, all parties know, that from that first agreed fight, [T.O.] did not have the through-and-through cut in his mouth where there was bleeding. That came from the second fight, which [E.A.S.] was clearly a part of." (RP 424, 425) However, the juvenile court quickly corrected the prosecutor:

I don't agree with the State in regards to my ruling as

far as the injury to [T.O.'s] mouth, [T.O.], the victim in this case, coming from the second assault. In fact, my ruling was there is no way to ascertain where the injuries came from, which is another basis as to why it was not an Assault in the Second Degree, not because [T.O.] did not incur injuries, but because the proof beyond a reasonable doubt did not indicate that the defendant, [E.A.S.], caused the Assault 2 level of injuries in regards to the mouth.

(RP 426)

Nevertheless, the juvenile court ordered E.A.S. to repay the full amount requested. (RP 427) The court ordered restitution, "Joint and Several with any co-respondent," for the entire \$4,183.93. (CP 43; RP 427)

A. THE JUVENILE COURT DID NOT HAVE AUTHORITY TO ORDER E.A.S. TO PAY RESTITUTION TO T.O. BECAUSE T.O.'S LOSS OR DAMAGE WAS NOT SHOWN TO BE A RESULT OF THE OFFENSE COMMITTED BY E.A.S.

A trial court's authority to impose restitution is derived from statute. State v. Hiett, 154 Wn.2d 560, 563, 115 P.3d 274 (2005) (citing State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999)). RCW 13.40.190 authorizes a juvenile court to include restitution as part of the disposition when a juvenile is adjudicated guilty of a crime:

In its dispositional order, the court shall require the [juvenile] respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent.

RCW 13.40.190(1)(a).

A restitution award must be based on a causal relationship between the offense charged and proved and the victim's losses or damages. Hiett, 154 Wn.2d at 565; State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993). "If, but for the criminal acts of the defendant, the victim would not have suffered the damages for which restitution is sought, a sufficient causal connection exists." State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992) (citing State v. Blair, 56 Wn. App. 209, 214-16, 783 P.2d 102 (1989)).

Restitution is limited to the crimes charged and proven at trial. State v. Ashley, 40 Wn. App. 877, 878, 700 P.2d 1207 (1985); State v. Mark, 36 Wn. App. 428, 675 P.2d 1250 (1984). And "if the loss or damage occurs before the act constituting the crime, there is no causal connection between the two." State v. Hunotte, 69 Wn. App. 670, 675, 851 P.2d 694 (1993).⁶

State v. Ashley is instructive here. In that case, the victim was assaulted by several juveniles, including Ashley. 40 Wn. App.

⁶ Abrogated on other grounds by State v. A.M.R., 147 Wn.2d 91, 96, 51 P.3d 790 (2002) as recognized in State v. R.G.P., 175 Wn. App. 131, 137 fn 6, 302 P.3d 885 (2013).

at 878. The victim was injured and fled. Later, the victim and his friends went looking for the assailants. When they found the assailants and surrounded them, Ashley displayed a knife. Although Ashley participated in the first assault that caused injury, he was only charged and convicted for brandishing the knife. 40 Wn. App. at 878. The juvenile court ordered Ashley to pay restitution for the injuries sustained by the victim in the first assault because of the close proximity in time and place of the two assaults. 40 Wn. App. at 878. But Division 1 reversed, holding that the juvenile restitution statute limits the scope of restitution to the precise offense committed:

Although the second assault may have been a direct result of the first assault, Ashley was only charged with the second assault; and as such, restitution, if any, is limited to that offense. Since there was no injury or loss as a result of the crime for which Ashley was charged and convicted, there can be no restitution.

Ashley, 40 Wn. App. at 879.

Similarly here, the juvenile court found insufficient proof that E.A.S. caused T.O.'s injuries. (RP 365-66, 426; CP 12) The court specifically states, "What we don't know is what injuries [E.A.S.] is responsible for." (RP 365) Because the court could not determine whether the injuries were caused by E.A.S. or by Q.R. during the

earlier fight, the court found E.A.S. guilty of simple fourth degree assault.⁷ (RP 365-66, 375)

The crime for which E.A.S. was convicted was a simple assault with no inflicted injury. The State did not show that E.A.S. caused T.O.'s injuries and there is ample evidence that T.O.'s injuries actually occurred as a result of his confrontation with Q.R., before E.A.S. committed his offense.⁸ The State therefore failed to establish a causal relationship between E.A.S.'s crime and T.O.'s losses or damages. Accordingly, the juvenile court did not have authority to order E.A.S. to pay restitution in this case.

B. EVEN IF THE JUVENILE COURT DID HAVE AUTHORITY TO ORDER RESTITUTION, THE COURT ABUSED ITS DISCRETION WHEN IT MADE E.A.S. SOLELY RESPONSIBLE FOR THE ENTIRE AMOUNT OF MONETARY LOSS SUFFERED BY T.O.

While the juvenile court is required to impose restitution on a juvenile offender for loss or damage suffered by the victim as a result of the offense committed, the court has discretion to "determine the amount, terms and conditions of the restitution." RCW 13.40.190(1)(d)(f); State v. Bennett, 63 Wn. App. 530, 532,

⁷ Second degree assault requires proof that the defendant "inflict[ed] substantial bodily harm." RCW 9A.36.021(1)(a). But a person is guilty of assault in the fourth degree if he or she merely "assaults another." RCW 9A.36.041(1).

⁸ Q.R. landed several heavy blows to T.O.'s face, on both the right side and the left, including in the area of his lip injury. (RP 131, 163, 194, 292, 375; Exh. 19)

821 P.2d 499 (1991). Furthermore,

If the respondent participated in the crime with another person or other persons, the court may either order joint and several restitution or may divide restitution equally among the respondents. In determining whether restitution should be joint and several or equally divided, the court shall consider the interest and circumstances of the victim or victims, the circumstances of the respondents, and the interest of justice.

RCW 13.40.190(1)(f). These decisions are reviewed for abuse of discretion. Bennett, 63 Wn. App. at 533. An abuse of discretion occurs when the order is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Bennett, 63 Wn. App. at 533.

According to the State, there were at least three other individuals who struck T.O. and one of those individuals, Q.R., struck T.O. with so much force that T.O. was knocked to the ground, and was bleeding and disoriented. (RP131, 163, 194, 204, 207, 220, 230, 236, 375; Exh. P19) And the juvenile court could not determine who caused T.O.'s lip injury. (RP 366, 426) Yet the juvenile court did not consider proportional responsibility or

consider reducing the amount that E.A.S. is required to pay.⁹

Even though the juvenile court did not know if E.A.S. caused any of T.O.'s injuries, and even though E.A.S. was not found to be an accomplice to a person who caused T.O.'s injuries, he is now required to bear the full burden of paying for T.O.'s loss. The other participants have no criminal or financial consequences for their involvement. Instead, 16 year old E.A.S., a high school student with no job, must bear the \$4,183.93 debt for T.O.'s damages all by himself. (RP 427)

The juvenile court clearly did not take into consideration E.A.S.'s circumstances or the interest of justice, as the statute requires, when it decided to place the full amount of restitution on E.A.S.'s shoulders. This was an abuse of discretion, and the restitution order should be vacated.

V. CONCLUSION

The juvenile court did not have authority to order E.A.S. to pay restitution because T.O.'s loss or damage was not shown to be a result of the offense committed by E.A.S. The restitution order

⁹ Counsel for E.A.S. suggested, as did the prosecutor, that perhaps E.A.S. could be required to pay the out-of-pocket expenses of T.O.'s family so they would be made whole, but be relieved of having to repay the insurance company. (RP 425-26, 427, 428) The trial court ignored this suggestion. (RP 427, 428)

should be stricken. Alternatively, the juvenile court abused its discretion when it ordered E.A.S. to repay the entire amount of T.O.'s loss without considering the interest of justice and the circumstances of the case—specifically, multiple blows from another assailant or assailants—which also requires the order to be stricken and the case to be remanded for a new restitution hearing.

DATED: January 11, 2016

A handwritten signature in cursive script, reading "Stephanie Cunningham".

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Appellant E.A.S.

IN THE COURT OF APPEALS, DIVISION II
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CERTIFICATE OF SERVICE

I, Stephanie C. Cunningham, court-appointed counsel for Appellant E.A.S., certify that I caused to be placed in the mails of the United States, first class postage pre-paid, a true and correct copy of the OPENING BRIEF OF APPELLANT and this CERTIFICATE OF SERVICE, addressed to:

4410 Home Stakes Drive
Parkton, NC 28371

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: January 11, 2016



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant E.A.S.

CUNNINGHAM LAW OFFICE

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